IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33726

LEWIS W. POE,	)	**2008 Unpublished Opinion No. 428**
	)	
Plaintiff-Appellant,	)	**Filed: April 14, 2008**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
LITTLE BLACKTAIL RANCH PARK HOME OWNERS' ASSOCIATION, INC., and Idaho corporation,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
	)	
Defendant-Respondent.	)	
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Steven C. Verby, District Judge.

Judgment for defendant in declaratory judgment action, affirmed.

Lewis W. Poe, Honolulu, Hawaii, pro se appellant.

Gary A. Finney of Finney, Finney & Finney, P.A., Sandpoint, for respondent.

LANSING, Judge

Lewis W. Poe appeals the district court's judgment in favor of defendant Little Blacktail Ranch Park Home Owners' Association ("Homeowners' Association") in this declaratory judgment action challenging annual dues charged to Poe and other acts of the Homeowners' Association.

I.
FACTUAL & PROCEDURAL BACKGROUND

Poe is the co-owner of property in Bonner County located in a planned unit development governed by the Homeowners' Association. The Homeowners' Association is a nonprofit corporation that is managed by a Board of Trustees ("Board") which administers various Covenants, Codes, and Regulations ("CC&Rs") pertaining to the property in the planned unit development. Poe brought an action against the Homeowners' Association, seeking a declaratory judgment that it had violated its own bylaws and covenants, as well as the Idaho

Code. In his lawsuit, Poe raised four contentions: that in October 2003 the Board fixed the annual dues in an untimely manner; that the Board raised the annual dues by an impermissible amount in the following year; that the Homeowners' Association did not provide him a statement of his account after he requested it; and that the Homeowners' Association failed to provide to him its financial statement as required by Idaho law. After a trial, the district court found in favor of the Homeowners' Association, and Poe appeals.

II.

ANALYSIS

In an appeal following a court trial, this Court will not set aside findings of fact unless they are clearly erroneous. Idaho Rule of Civil Procedure 52(a); *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 363, 93 P.3d 685, 694 (2004); *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). A finding of fact is not clearly erroneous if the district court's findings are supported by substantial and competent evidence, even if that evidence is conflicting. *Mountainview Landowners Co-op Ass'n, Inc. v. Dr. James Cool, D.D.S.*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004); *D & M Country Estates Homeowners Ass'n v. Romriell*, 138 Idaho 160, 164, 59 P.3d 965, 969 (2002); *Kohring v. Robertson*, 137 Idaho 94, 99, 44 P.3d 1149, 1154 (2002). We give due regard to the district court's special opportunity to judge the credibility of the witnesses who personally appear before the court. *Shawver*, 140 Idaho at 363, 93 P.3d at 694; *D & M Country Estates Homeowners Ass'n*, 138 Idaho at 164, 59 P.3d at 969. In contrast to the appellate review of findings of fact, this Court exercises free review over the district court's conclusions of law. *Id.* Therefore, this Court may substitute its view for that of the district court on a legal issue.

A. Dues Increase Authorized on October 18, 2003

Poe first asserts that the Board violated Article 5.3 of the CC&Rs by setting the annual dues in an untimely manner. That article provides in part that:

> The Board shall determine and fix the amount of the maximum annual Regular Assessment against each Unit at least sixty (60) days in advance of the start of each fiscal year.

The fiscal year of the Homeowners' Association begins on October 1 and runs through September 30 of the following year. On October 18, 2003, the Board raised the yearly dues from $103 per year to $113, "effective starting January 1, 2004."

Poe argues that this action is untimely. The Homeowners' Association contends that Poe misunderstands how the annual assessments are set, collected, and spent. At trial, two former members of the Board testified that it is a two-year process. They said that the assessment is set and collected during the one fiscal year, and then budgeted and spent the next fiscal year. They illustrated by saying that, in October 2002, the Board set an annual assessment at $103. In January of 2003, half of that assessment was collected. In April 2003, a budget was set for the fiscal year commencing October 1, 2003. In July of 2003, the second half of the $103 assessment was collected. In October 2003, the $103 assessment began to be spent, and would continue to be spent according to the budget through September of 2004. In the meantime, on October 18, 2003, the Board set the next annual assessment at $113. In January of 2004, the first half of this higher assessment was collected. In April 2004, a budget was set for the fiscal year beginning October 1, 2004. In July 2004, the second half of the $113 assessment was collected. In October 2004, the assessment began to be spent, and would continue to be spent according to the budget through September of 2005. They explained that this process of collecting the next year's assessment while spending the current year's assessment is an ongoing process.

The disagreement in this case is about the meaning of the sixty-day time requirement. Poe contends that the dues must be set at least sixty days before the fiscal year in which they are collected. The Homeowners' Association asserts that the assessment on October 18, 2003, was done 348 days in advance of the start of the fiscal year for which it was budgeted and spent.

When interpreting CC&Rs, we apply the rules of contract construction. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). In doing so, we employ a two-step analysis. Beginning with the plain language of the covenant, the first step is to determine whether or not there is an ambiguity. *Brown v. Perkins*, 129 Idaho 189, 192-93, 923 P.2d 434, 437-38 (1996). A covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Post v. Murphy*, 125 Idaho 473, 475, 873 P.2d 118, 120 (1994). Whether a provision is ambiguous is a question of law over which we exercise free review. *Id.* If the covenants are unambiguous, then the plain meaning governs. *Id.* Conversely, if there is an ambiguity in the covenants, then interpretation is a question of fact, and the court must determine the intent of the parties at the time the instrument was drafted. *Brown*, 129 Idaho at 193, 923 P.2d at 438. To determine the drafters' intent, the Court looks to "the language of

the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties." *Id*.

Article 5.3 of the CC&Rs is ambiguous because it could be reasonably interpreted, as Poe suggests, as requiring the assessment to be fixed at least sixty days before the fiscal year in which it is collected. On the other hand, it can also be reasonably interpreted, as the Board did, as requiring the assessment to be fixed at least sixty days before the fiscal year in which it is spent. Because of the two-year process of first collecting and then spending these assessments, it is unclear which "fiscal year" Article 5.3 is referencing. After a trial on the merits, the district court implicitly found that the Board's interpretation of this provision was correct. This finding of fact is supported by substantial and competent evidence, including the testimony about the regular practice of the Homeowners' Association over the years, and so we defer to the district court's findings on this point.[1]

B. Increase in Dues in July 2004

Poe next argues that the Board raised the annual dues by an impermissible amount in July 2004. In particular, he notes a portion of Article 5.3 of the CC&Rs, which provides:

> [T]he maximum annual Regular Assessment may not be increased by more than ten percent (10%) above the maximum annual Regular Assessment for the immediately preceding fiscal year, without the vote or written assent of two-thirds (2/3) of the voting power of the members.

The dues had initially been $103. On October 18, 2003, the Board raised the dues from $103 to $113. As noted above, Poe asserts that this action was improper because it was not done sixty days in advance of the fiscal year. He then reasons that the October 18, 2003 increase was consequently void, and when the board again raised the dues to $124 in July 2004, this was

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[1] Poe contends that the district court incorrectly denominated fiscal years because the court referred to fiscal years by the number of the calendar year in which the fiscal year ended. For example, the court referred to fiscal year that began on October 1, 2003 and ended on September 30, 2004, as fiscal year 2004. Poe insists that this year was fiscal year 2003. To the extent that any of his claims of reversible error are predicated upon this question of fiscal year denomination, his argument is without merit. This Court is unaware of any rule governing how fiscal years are named, but in this Court's experience, it is a nearly universal practice to refer to fiscal years by the calendar year in which the fiscal year *ended*. That is the manner in which fiscal years were denominated by the Homeowners' Association, at least at one time. *See* plaintiff's exhibit 8, page 3, referring to fiscal year 1993 as "1Oct92-30Sep 93." In any event, we do not perceive how the terminology used had any effect on the substantive factual issues presented or on the outcome of the trial.

actually a jump from $103 to $124, an improper increase of nearly 21.6 percent. As we addressed in the previous section, however, the board's actions of October 18, 2003, were in compliance with the CC&Rs. The $11 increase from $113 to $124 was less than 10 percent, and was therefore proper.

C. Statement of Account

Poe next argues that he did not timely receive a statement of his account after requesting the same, in violation of the Homeowners' Association bylaws. Article 7.4 of the bylaws provides that "[u]pon ten (10) days notice to the Board and payment of a reasonable fee, the Unit Owner shall be furnished a statement of his account setting forth the amount of any unpaid Assessments or other charges due and owing from such Owner." On January 20, 2004, Poe wrote a letter to the Board requesting such a statement of his account, and included an $8 check to defray the reasonable costs of doing so. The check was deposited in the Homeowners' Association's bank account on March 19, 2004. At trial, Poe testified that he never received a statement of his account. The district court found otherwise and held that Poe had been provided with a statement of his account listing the amount of unpaid assessments and charges that he owed.

Despite Poe's protestations that he did not receive a statement of his account, the district court's finding otherwise is supported by substantial and competent evidence, and so we defer to its findings. In particular, we note the testimony of the treasurer, Thomas Cavanaugh, who stated that, after receiving the letter, he contacted the Homeowners' Association account representative and asked her to send Poe another statement of his account. He also testified that in the same time frame, because of a clerical error, all the members automatically received another statement, so that by March 1, 2004, Poe should have received two copies of his statement. Cavanaugh also stated that he received another letter from Poe dated March 1, 2004, referencing his account in a manner that indicated that Poe had received at least one of these statements. Although Poe challenges this testimony, it is sufficient evidence to support the district court's factual finding. As noted above, credibility determinations are for the trial court.

Poe argues on appeal that the district court erred in not addressing whether the statement of his account was provided in a timely manner--that is, whether the Board provided the statement within ten days of Poe's request. This was not the thrust of his argument to the district court below. Although there was some testimony about when the statement of the account was

sent, Poe's evidence and argument to the district court was that he did not receive the statement at all; he did not claim there was an allegedly untimely statement.[2] We therefore decline to address this claim of error because we will address only issues raised in the lower court and will not address issues raised for the first time on appeal. *Lankford v. Nicholson Mfg. Co.*, 126 Idaho 187, 189, 879 P.2d 1120, 1122 (1994); *Bonner Bldg. Supply, Inc. v. Standard Forest Prod., Inc*., 106 Idaho 682, 684, 682 P.2d 635, 637 (Ct. App. 1984).

D. Financial Statements

Finally, Poe contends that the Homeowners' Association failed to provide to him its latest annual financial statement, in violation of Idaho Code § 30-3-134. This code section, which governs nonprofit corporations such as the Homeowners' Association, provides:

> (1) . . . a corporation upon written demand from a member shall furnish that member its latest annual financial statements, which may be consolidated or combined statements of the corporation and one (1) or more of its subsidiaries or affiliates, as appropriate, that include a balance sheet as of the end of the fiscal year and statement of operations for that year. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis.
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> (2) If annual financial statements are reported upon by a public accountant, the accountant's report must accompany them. If not, the statements must be accompanied by the statement of the president or the person responsible for the corporation's financial accounting records:
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> (a) Stating the president's or other person's reasonable belief as to whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and
>
> (b) Describing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

Pursuant to this code section, on January 18, 2004, Poe wrote a letter to the Homeowners' Association demanding the corporation's latest financial statements. Poe also included a check for $12 to defray the costs associated with this demand. He testified that, with the possible exception of a copy of some minutes from a Board meeting, he did not receive the requested

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[2] To the extent that Poe argues that the Homeowners' Association should have provided evidence that the furnished statement of Poe's account was timely, it is not the defendant's burden to disprove the plaintiff's allegations, but rather is the plaintiff's burden to prove them by a preponderance of the evidence.

documents. The district court found that Poe did receive the financial statements, although the court noted that they were technically deficient because there was no signature of certification as required by I.C. § 30-3-134(2)(a) and (b).

We again defer to the district court's factual findings because, although the evidence is conflicting, the court's decision is supported by substantial and competent evidence. Cavanaugh testified that he provided Poe with a record of all of the deposits and all the expenditures from the Homeowners' Association's two accounts, an audit committee report, and a copy of the minutes of the Board meetings. He stated that, while these materials were not sent specifically in response to Poe's letter, they were sent within a day or two of Poe's letter to all the members of the Homeowners' Association as a matter of due course. This evidence is sufficient to support the district court's finding that the Homeowners' Association substantially complied with I.C. § 30-3-134, despite some technical noncompliance with the required form.

Poe argues that he should be refunded $12 because the other members of the Homeowners' Association were not charged $12 for this service. The district court found that he had been reimbursed because, while the testimony indicates that the Homeowners' Association deposited this money into its bank account, Cavanaugh testified without contradiction that Poe's homeowner account had been credited by this amount. Thus, the $12 was credited as a set-off against past or future assessments. Furthermore, Poe did not request this remedy below.

To the extent that Poe raises the Homeowners' Association's technical noncompliance with the statute in not certifying the annual financial statement, this error is extremely minor, and Poe does not argue that he was harmed by it in any way. Rather, the only remedy Poe seeks on appeal is a refund of his $12, but as the district court found, that $12 was effectively refunded by a credit to his account.

To the extent that Poe argues that attorney fees should not have been awarded against him below because he prevailed on this small point, he did not make this argument in his opening brief, but in his reply brief. We do not address this issue because issues raised for the first time in a reply brief ordinarily are not addressed by an appellate court. *See Myers v. Workmen's Auto Ins. Co.*, 140 Idaho 495, 508, 95 P.3d 977, 990 (2004); *State v. Killinger*, 126 Idaho 737, 740, 890 P.2d 323, 326 (1995).

E. Attorney Fees on Appeal

The Homeowners' Association requests attorney fees on appeal pursuant to Idaho Appellate Rule 41 and I.C. § 12-121. An award of attorney fees on appeal is proper under I.C. § 12-121 only if this Court is left with the abiding belief that the appeal was brought or pursued frivolously, unreasonably, and without foundation. *See Anson v. Les Bois Race Track, Inc.*, 130 Idaho 303, 305, 939 P.2d 1382, 1384 (1997). Although Poe did not prevail in this appeal, and his lawsuit presented causes of action that reasonable people would regard as petty and trivial, we cannot say that his appeal was frivolous in its entirety. Consequently, no attorney fees will be awarded. Costs, however, are awarded to the Homeowners' Association as the prevailing party pursuant to I.A.R. 40.

III.
CONCLUSION

The district court's findings are supported by substantial and competent evidence. The judgment in favor of the Homeowners' Association is therefore affirmed. Costs on appeal to respondent.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**